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**DEC 21 1998**

FEDERAL COMMUNICATIONS COMMISSION  
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December 21, 1998

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**DEC 21 1998**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

BY HAND

Magalie Roman Salas, Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

Re: **Reply Comment Filing**  
Satellite Delivery of Network Signals to Unserved Households  
CS Docket No. 98-201, RM No. 9335, RM No. 9345

Dear Ms. Salas:

Enclosed are an original and eight copies of the Reply Comments of Primestar Partners, L.P. in these proceedings. We also are forwarding an appropriately formatted diskette to Mr. Fowler.

If you have any questions regarding the enclosed, please contact me.

Very truly yours,

*Robert L. Hoegle* <sub>CPB</sub>

Robert L. Hoegle

RLH:vaa  
Enclosures

cc: Mr. Don Fowler (w/disk encl.)  
International Transcription Service, Inc. (w/disk encl.)

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DEC 21 1998  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
Satellite Delivery of Network Signals	)	CS Docket No. 98-201
to Unserved Households for	)	RM No. 9335
Purposes of the Satellite Home	)	RM No. 9345
Viewer Act	)	
	)	
Part 73 Definition and Measurement	)	
of Signals of Grade B Intensity	)	

**REPLY COMMENTS OF PRIMESTAR PARTNERS, L.P.**

Primestar Partners, L.P. ("Primestar") submits these Reply Comments in response to the Comments of the television network affiliates, their trade associations and the television networks which oppose any change in the Commission's existing Grade B signal strength rules. Rather than attempting to address the technical issues raised in the Commission's Notice, the broadcast commenters seek to characterize this proceeding as an attempt by "scofflaws" to "poach" or "rob" viewers from local network affiliates. Instead of constructive comments to improve the Grade B signal strength rules, the broadcast commenters put forth inconsistent technical arguments and conflicting legal positions, all designed solely to preserve a status quo favorable to their interests and not to advance the Congressional intent to make network programming available to "unserved households." Based upon the flawed assumption that every household determined to be unserved will choose a distant network signal delivered by satellite rather than cable, the far more common choice, the broadcast commenters direly claim that any change by the Commission in the Grade B standard will threaten free over-the-air television and localism.

Lost among the hyperbole and invective are several straightforward issues requiring immediate resolution by the Commission:

- Does the existing Grade B signal strength standard, developed more than forty years ago for a different purpose, yield an acceptable television picture at specific households? If not, how should it be changed?
- What methodology most accurately predicts such signal strength at individual household locations?
- What simple and cost-effective testing methodology (recognizing that virtually any form of individualized testing will be cost prohibitive on a widespread scale) will reliably determine the presence of such signal strength at individual households?

These technical issues plainly are within the Communications Act authority and expertise of the Commission. The satellite carriers do not seek to have the Commission rewrite the copyright laws or to limit their application through any independent judgment of what the scope of copyright protection should be. They seek only to have the Commission determine the appropriate Grade B signal strength and predictive and individual measurement methodologies for the purpose of determining signal availability at specific households.

By addressing these three issues, the Commission can give definitive guidance to broadcasters, satellite carriers and consumers as to the appropriate methods for determining which households are “unserved” because they do not receive an adequate Grade B signal. Broadcasters will not lose viewers because such households could not have received their programming signal in any event.<sup>1</sup>

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<sup>1</sup> The network affiliates also seek to introduce the element of potential lost advertising revenues in this proceeding. Joint Comments of the ABC, CBS, Fox, and NBC Television Network Affiliate Associations (“Network Associations Joint Comments”), at 52. However, they make no effort to limit the confusion in those circumstances where the predicted Grade B signal extends outside their advertising market.

I. Congress Did Not “Freeze” the Commission’s Definition of Grade B Signal Strength as It Existed in 1988.

The broadcast commenters argue that the Commission has no authority to change its definition of Grade B signal strength or the methodology for measuring such strength because Congress enacted the standard that existed in 1988. See Network Associations Joint Comments at 27-37; Comments of National Association of Broadcasters (“NAB Comments”), at 26-33. Their arguments ignore the plain language of the statute and are based upon strained and distorted interpretations of court decisions.<sup>2</sup> Faced with the case law cited by the Commission and the Satellite Broadcasting and Communications Association (“SBCA”), the broadcast commenters try to distinguish those controlling decisions, but their distinctions yield no substantive difference.

The Commission need look no further than the plain language of the statute, which specifically refers to an “over-the-air signal of Grade B intensity (as defined by the FCC).” Congress did not incorporate the language of any specific Commission rule or suggest that the Commission could not change or otherwise refine its definition. Its delegation of implementing authority to administrative agencies may be explicit or implicit. National Fuel Gas Supply Corp. v. FERC, 811 F.2d 1563, 1569 (D.C. Cir.), cert. denied, 484 U.S. 869 (1987). Where, as here, Congress “has explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.” Chevron U.S.A. v. Natural Resources Defense Counsel, 467 U.S. 837, 843-844 (1984). In defining “unserved

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<sup>2</sup> For example, the broadcast commenters claim that Federal District Courts in North Carolina and Florida have ruled that Congress codified the Commission’s Grade B standard as it existed in 1988. Network Associations Joint Comments at 36-37; NAB Comments at 33, 68; Comments of the Walt Disney Company at 16-17. Neither court expressed any such conclusion in its opinion. The Courts held only that the Commission’s current rules define Grade B signal strength for purposes of determining whether a household is unserved. They were not presented and did not decide the issue of whether the Commission could change that definition for purposes of the Satellite Home Viewers Act (“SHVA”).

households” under 17 U.S.C. §119(d)(10), Congress expressly deferred to the Commission to “define” Grade B signal strength.

The broadcast commenters also appear to suggest that the Commission may not make any change in the Grade B standard in this proceeding because various witnesses and the Commission estimated more than a decade ago that only a “relatively small number of viewers,” perhaps in the range of a million households, would qualify as “unserved households.” Network Associations Joint Comments at 9-12; NAB Comments at 15-16. First, there is nothing in the legislative history of SHVA to suggest that Congress intended to limit “unserved” households in this manner. If it had, it simply could have said so. Second, such estimates cannot preclude the exercise of the Commission’s statutory authority as a legal matter. Third, the estimates were made in 1988, and likely based on 1980 census data, long before geocoding was a practical alternative. The broadcast commenters’ unqualified reliance on these data ignores substantial population increases and shifts. When Primestar investigated the geocoding process earlier this year, it learned that approximately 15 percent of the nation’s households cannot be geocoded with existing databases because the new communities which are constantly being built in outlying suburbs and rural areas are not yet reflected in the databases.

In short, the Commission has the authority to define Grade B signal strength in the context of SHVA. Contrary to the broadcast commenters’ pejorative characterization of any such change as a “manipulation” of the Grade B standard by the Commission to expand unlawfully “white areas,” the Commission may modify that standard in the exercise of its expert judgment for the purpose intended by Congress -- to determine whether households are “unserved” by one or more local network affiliates.<sup>3</sup>

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<sup>3</sup> If a household is unserved, it is entitled under SHVA to obtain a network signal or signals from whatever source or time zone it seeks. The Commission should not consider attempts to limit

II. The Commission May Resolve the Specific Technical Issues Raised by the Petitions without Addressing Broader Technical And Policy Issues Or Recommending Legislation to Congress.

Recognizing that the existing Grade B standards were adopted for another purpose in another time, the broadcast commenters seek to block or delay any change by arguing that the Commission “would have to change its Grade B rules for all regulatory purposes and not solely for purposes of [SHVA].” Network Affiliate Associations Joint Comments at 39 (emphasis in original); NAB Comments at 37 (“Any such change would need to be applied generally, and would need to be the product of a massive empirical and legal inquiry....”). For example, the broadcast commenters argue that the Commission would have to reopen the determinations in its DTV proceeding because it relied on its existing Grade B signal strength values.<sup>4</sup>

Of course, the Commission could not engage in the extensive review and potential rewrite of multiple rules under the broadcasters’ approach within the time frame it has set for this rulemaking. Thus, the broadcasters conveniently conclude that the Commission can do nothing. However, it is clear under the controlling case law that Commission need not follow this do everything or nothing approach -- the Commission may define the same term in different ways for different purposes:

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the network signals available even to unserved households. See Comments of the National Football League at 6, n.5. The NFL’s concerns are outside SHVA and far beyond the Grade B signal availability issues presented in this proceeding.

<sup>4</sup> The broadcast commenters also urge that the Commission’s decision to use the existing Grade B signal values in the DTV proceeding forecloses its examination of those values in this proceeding. However, the Commission used the existing Grade B values in the DTV proceeding for a different purpose -- to preserve broadcast stations’ outer service contours from potential signal interference. The Commission did not reevaluate the Grade B signal strength standard in terms of resulting picture quality or availability at specific households. See Engineering Statement of Hatfield & Dawson Consulting Engineers annexed to Reply Comments of the SBCA (“Hatfield & Dawson Reply Engineering Statement”) at 3.

An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated disapproval of a flexible reading of the statute.

Chevron, 467 U.S. at 863-864. Thus, in Chevron the Court upheld the Environmental Protection Agency's different definitions of the term "source" in implementing different sections of the same statute. See United Technologies Corp. v. EPA, 821 F.2d 714, 723 (D.C. Cir. 1987) (upholding the EPA's different definitions of "facility"). In this proceeding, the Commission may adopt different Grade B standards for different purposes<sup>5</sup> under different statutory schemes. This approach is also appropriate from an engineering standpoint. See Hatfield & Dawson Reply Engineering Statement at 1-2.

The broadcast commenters also urge the Commission to make no changes now because the real "solution" is "local-into-local legislation" with all of the requirements sought by television network affiliates. See Network Affiliate Associations Joint Comments at 109; NAB Comments at 51. Again, the broadcasters' proposed "solution" introduces a series of technical and policy issues which are irrelevant to resolving the discrete technical issues in this proceeding. First, Congressional authorization of "local-into-local" service has not yet occurred. Second, it is extremely unlikely that all markets will receive local-into-local service. Third, it is unclear that local-into-local service is a financially viable alternative or that all satellite carriers will have the ability to carry local signals into local markets. Thus, it is important for the Commission to resolve the technical issues needed to determine whether a household is "unserved" under SHVA as it now

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<sup>5</sup> The Commission clearly identified the differing purposes of its Grade B standard under the Communications Act and SHVA. Thus, the Grade B standard was intended "to be used generally to determine the service area, or contour, of a television station," but it was never intended or designed "to identify individual unserved households" under SHVA. Notice at ¶4.

exists. Local-into-local proposals are outside the scope of this proceeding and would only delay resolution of the issues before the Commission.

The Commission can and should address the technical issues required for resolution of the unserved household problem. It may target its analysis at these specific issues without revising its existing Grade B signal strength standard for all other purposes or embarking upon the complex policy and engineering issues raised by local-into-local service.

III. The Commission Should Consider the Technical Proposals Offered by SBCA And Adopt Grade B Signal Strength Standards And Predictive And Individual Testing Methodologies to Determine Unserved Households.

A. Updated Grade B Signal Strength Values

Although the broadcast commenters urge a different result, they agree with the SBCA and satellite carriers on one issue, i.e. much has changed over the past fifty years since the Commission first calculated the planning factors underlying the existing Grade B values. See Affiliate Associations' Joint Comments at 43-47. However, while claiming improvements in receiver noise figures, they ignore the substantial understatements in multiple planning factors as identified in the Engineering Statement of Hatfield & Dawson Consulting Engineers ("Hatfield & Dawson Engineering Statement") at 4-5 and Appendix 2, annexed to the SBCA Comments. If the Commission does not adopt adequate signal strength values which yield a television picture acceptable to today's viewer, its efforts to adopt a predictive methodology and a revised testing protocol largely will be wasted.<sup>6</sup>

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<sup>6</sup> Although claiming that the Commission does not have the authority to adopt a predictive model, the NAB then suggests that any "different location and time variability percentages" be incorporated in that model rather than revised signal strength values. NAB Comments at 37, n. 19. Any such changes should be incorporated into revised Grade B signal strength values -- not in a predictive model which the NAB would then challenge in the courts.



B. Appropriate Predictive Methodology

As a practical matter, the Commission will do little to resolve these issues and address consumer concerns and uncertainty unless it adopts a uniform predictive methodology. Primestar agrees that actual field tests conducted in accordance with a test protocol adopted by the Commission should be determinative. However, if such field tests are a prerequisite for the delivery of distant network signals, as a practical matter, virtually no households will qualify as “unserved.”<sup>7</sup> As Primestar explained in its initial Comments at 5-8, the adoption of a uniform predictive methodology is the lynchpin to any resolution of this difficult problem. When customers call and ask about the available services, satellite carriers must have a reasonably reliable means to answer their questions regarding the availability of network signals. Although dispositive, widespread field testing would be costly, unfeasible and consumer-unfriendly.

The Commission should consider the relative attributes of the available point-to-point signal strength predictive methodologies, including the Longley-Rice 1.2.2 and TIREM methodologies, to determine the best methodology for predicting Grade B signal strength at individual household locations. See Hatfield & Dawson Reply Engineering Statement at 4-9.

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<sup>7</sup> At least one network has agreed that this same balance between a predictive methodology and actual testing is appropriate:

FBC is not urging the Commission to replace the actual measurement standard in SHVA with a predictive model. However, to stem the tide of requests for actual measurements -- which are costly and time consuming -- FBC urges the Commission to adopt an improved method for predicting Grade B service. Even though the FCC would be endorsing an improved prediction method, parties would retain their statutory right to demand actual measurements, therefore, FCC action on this issue does not raise jurisdictional issues.

Comments of Fox Broadcasting Company at 8 (emphasis in original) (note omitted).

However, such evaluation should be based upon publicly available information and not summary reports of private expert analyses for which the underlying data are not introduced in the record.<sup>8</sup>

Although certain commenters question the ultimate impact of incorporating additional factors such as interference, buildings and vegetation, none claims that such data have no impact on signal strength. See Cohen Declaration at ¶33 (regarding urban clutter). Because factors such as interference and vegetation and urban clutter may have a significant impact on signal availability, they should be incorporated into any predictive model. See Hatfield & Dawson Engineering Statement at 11-12 and Reply Engineering Statement at 10-11. Decisionmark Corp., which has implemented predictive models as requested by its clients,<sup>9</sup> has stated that:

Decisionmark does not believe incorporation of additional factors, including interference, buildings, and vegetation, would have a significant effect on the cost or practicality of utilizing the methodology for SHVA compliance purposes. Decisionmark has the capability to implement such modifications quickly.

Comments of Decisionmark Corp. at 11 (note omitted). Likewise, Decisionmark has confirmed that existing models “can be readily modified to take co-channel and adjacent-channel interference into account.” Id. at 10 (note omitted). In view of the publicly available databases containing such information and the ease with which it may be incorporated into a predictive methodology, the Commission should include such data in any predictive model it adopts.

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<sup>8</sup> For example, the Engineering Statement in Support of the NAB Comments, by Jules Cohen, P.E. (“Cohen Declaration”), refers at ¶¶35-37 to empirical test results apparently performed in the PrimeTime 24 litigation. However, the statement does not present any of the underlying data for such tests.

<sup>9</sup> Decisionmark’s Comments on the ease of implementing different methodologies and databases should be accorded some weight based upon its prior experience in doing so. However, its endorsement of Longley-Rice 1.2.2, in contrast to other propagation models, should not be accorded the same weight. Decisionmark has used the Longley-Rice model pursuant to the Settlement and Compliance Agreement and at PrimeTime 24’s request in accordance with the Florida Court’s decision. In neither instance was Decisionmark involved in the selection of the Longley-Rice model.

C. Simplified Individual Testing Methodology

The broadcast commenters generally endorse the testing protocol which was incorporated into their Settlement and Compliance Agreement with Primestar. Affiliate Associations' Joint Comments at 73-76; NAB Comments at 44-45. As Primestar noted in its initial Comments at 8-9, this testing methodology represents an improvement on the Commission's test protocol, which again is directed at a different purpose, but additional simplification and improvements are necessary. See Hatfield & Dawson Engineering Report at 12-13. Simplified testing is not, however, the answer. A predictive model is essential.

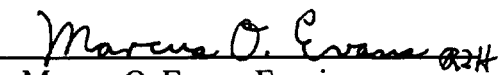
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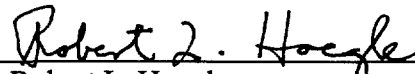
The Commission can and should address the technical issues required for a uniform and practical resolution of the "unserved household" problem. In doing so, it will not be "manipulating" the statute or "robbing households" from broadcasters as charged by the broadcast commenters. Instead, it will end the uncertainty and litigation over this issue, establishing a uniform methodology for satellite carriers and television network affiliates to determine fairly which households are unserved by local network affiliates.

December 21, 1998

Respectfully submitted,

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